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AGENCY, EQUALITY, AND ANTIDISCRIMINATION LAW

Tracy E. Higgins†
Laura A. Rosenbury††

> *It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.*[1]

INTRODUCTION

A century ago, Justice Harlan[2] insisted—in vain at the time—that the Constitution "neither knows nor tolerates classes among citizens."[3] This short but powerful phrase offers a perfect illustration of the changing context of equality-based constitutional claims. Responding to the political and social setting in which the state treated African Americans as naturally unequal and appropriately subjugated, Justice Harlan's rebuke of the majority in *Plessy v. Ferguson* was surely a warning about a missed opportunity for expanding freedom.[4] Eliminating this official subjugation by the imposition of a standard of official color-blindness would have been a move toward liberation in 1896; it certainly proved to be one-half a century later.[5] Nevertheless, read in the context of our own time, the phrase highlights the very complexity of equality jurisprudence. Today, one might respond to Justice

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1 United Steelworkers v. Weber, 443 U.S. 193, 204 (1979) (quoting 110 CONG. REC. 6552 (1964) (statement of Sen. Humphrey)).

2 This was the first Justice John Marshall Harlan who served on the United States Supreme Court from 1877 to 1911; the second Justice John Marshall Harlan (a grandson of the first) served from 1955 to 1971. *See* WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 1554 (8th ed. 1996).

3 Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

4 In *Plessy*, the Supreme Court articulated the doctrine of "separate but equal," thus laying the groundwork for decades of state-sponsored segregation and oppression. *See id.* at 548-52.

5 *See* Brown v. Board of Educ., 347 U.S. 483, 493-95 (1954) (rejecting the doctrine of separate but equal in the face of manifest inequality in segregated public schools).

Harlan that the problem is that the Constitution does not know classes among citizens and therefore tolerates them in life, if not in law.

In a distortion of Justice Harlan's reading,[6] the Supreme Court increasingly has interpreted the Equal Protection Clause as a mandate for the state to treat citizens as if they were equal—as a limitation on the state's ability to draw distinctions on the basis of characteristics such as race[7] and, to a lesser extent, gender.[8] To the extent that the targets of feminists and civil rights lawyers took the form of state-sponsored, identity-based subjugation, such as male-only juries and Jim Crow laws, the Court's move toward this interpretation has served us relatively well.[9] Moreover, for the first two decades following *Brown v. Board of Education*, the color-blindness approach was qualified by the Court's acceptance of benign race-conscious measures.[10] This two-tiered review of racial classifications permitted the government to develop policies that address more subtle forms of discrimination. These efforts have taken the form of affirmative action strategies such as set-aside programs, race- and gender-specific scholarships, hiring preferences, and voter redistricting plans, among others.[11]

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6 Although Justice Harlan stated that "[no] legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved," *Plessy*, 163 U.S. at 554-55 (Harlan, J., dissenting), his concern went beyond mere color-blindness to the elimination of caste. *See id.* at 559 (Harlan, J., dissenting) ("In respect of civil rights, all citizens are equal before the law.").

7 *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 204-05 (1995) (striking down minority preference system in government contracts).

8 *See, e.g.*, United States v. Virginia, 518 U.S. 515, 519 (1996) (striking down male-only admissions policy at state-run military college).

9 *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994) ("We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality."); Frontiero v. Richardson, 411 U.S. 677, 678-79 (1973) (striking down statutory provision discriminating against servicewomen's spousal benefits); Reed v. Reed, 404 U.S. 71, 75-77 (1971) (striking down state probate code discriminating against women when appointing administrators of estates); Loving v. Virginia, 388 U.S. 1, 2 (1967) (striking down state statutory ban on miscegenation); *Brown*, 347 U.S. at 493-95 (striking down state laws permitting or requiring racial segregation in public schools). *But see* Michael M. v. Superior Court, 450 U.S. 464, 469-76 (1981) (plurality opinion) (upholding state statute criminalizing only statutory rape by men).

10 *See infra* notes 35-47 and accompanying text (discussing cases).

11 This effort began on the federal level over three decades ago with the passage of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5, 28, and 42 U.S.C.), and the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 (1994)). More recent federal legislation has included the Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601-54 (1994 & Supp. III 1997)), and the Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.). On the state and local level, examples include reforms of domestic violence and sexual assault statutes. *See, e.g.*, Domestic Abuse Act, MINN. STAT. ANN. § 518B.01 (West Supp. 2000) (reforming standards for the issuance of orders for protection of victims of domestic violence).

These gender- and race-specific policies are now very much threatened by the Court's narrowing conception of equal protection. In the context of race, the Court has struck down not only race-specific policies designed to harm the historically oppressed, but race-conscious policies designed to foster racial equality.[12] Although in theory the Court has left open the possibility that benign uses of race may be constitutional under some set of facts, in practice it has yet to identify such a policy since it adopted strict scrutiny across the board.[13] In its equal protection analysis of gender, the Court has also moved toward a stricter level of scrutiny, calling into question the possibility of benign uses of gender as well.[14] As the Supreme Court narrowed the scope of benign race-based categories permitted by the Constitution, political forces have launched attacks on affirmative action policies at both the state and federal levels.

These legal and political developments have reinvigorated the debate in the legal literature as to whether the Equal Protection Clause requires, permits, or forbids the use of race-conscious state policies intended to promote racial equality. Some commentators, perhaps a minority, have argued that the Equal Protection Clause should be read to require the use of race-conscious policies when necessary to eradicate or remedy the most serious consequences of racial inequality.[15] Others have argued that such policies, though not required,

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12 *See infra* notes 35-48 and accompanying text (discussing the Court's recent equal protection cases).

13 Justice O'Connor insisted in *Adarand* that the standard is not "'strict in theory, but fatal in fact.'" Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)). However, the Court has not upheld a racial classification since *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), the last case to apply a more lenient standard to benign racial classifications. *See Metro Broad.*, 497 U.S. at 563-66.

14 *See* Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1675 (1997) ("[T]he Supreme Court has moved increasingly toward an interpretation of equal protection as a guarantee of neutral treatment by the state with respect to . . . gender. In other words, the Equal Protection Clause guarantees that the state will treat citizens as individuals rather than as part of . . . gender-defined groups." (footnote omitted)). *But see* Denise C. Morgan, *Finding a Constitutionally Permissible Path to Sex Equality: The Young Women's Leadership School of East Harlem*, 14 N.Y.L. SCH. J. HUM. RTS. 95, 101-13 (1998) (arguing that *United States v. Virginia* would permit a gender-conscious policy with sufficient showing of remedial purpose).

15 *See, e.g.*, T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1062 (1991) (arguing that "we are not currently a colorblind society, and that race has a deep social significance that continues to disadvantage blacks and other Americans of color" and concluding that "in order to make progress in ending racial oppression and racism, our political and moral discourse must move from colorblindness to colorconsciousness, from antidiscrimination to racial justice"); *cf.* CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 42 (1987) ("[I]f differentiation into classifications, in itself, is discrimination . . . the use of law to change group-based social inequalities becomes problematic, even

should be permitted when duly adopted by the majority of the populace to promote the interests of an historically oppressed minority.[16] Still others, including now a majority of the Supreme Court, take the view that the Constitution forbids virtually all explicit uses of race by the state.[17]

In this Essay, we do not enter this debate directly. Rather, we attempt to explore the reasons behind the increasing acceptance of a norm of color-blindness—both politically and legally—and locate those reasons within a particular liberal conception of the limited, neutral state. We then attempt to demonstrate that the movement toward an increasingly strict view of discrimination as simply color-consciousness has not been limited to the equal protection context. We see a parallel move in the regulation of private discrimination under Title VII: a move from the view that Title VII requires, or at least permits, race-conscious actions to a view that the antidiscrimination imperative in Title VII requires color-blindness on the part of private employers. This development in Title VII doctrine has at times been explicit; but more often it has been implicit, only apparent as a shift in assumptions about the meaning of employer conduct and the prevalence of identity-based discrimination. In the last section of the Essay, we challenge this parallel evolution of the doctrine in these two areas by arguing that many of the reasons for a color-blindness standard in the context of state action are simply irrelevant or incoherent when applied to the regulation of private conduct.

I
Equality and the Liberal State

In this Essay, we do not take a position on the interpretive legitimacy or historical correctness of the equality-as-group-blindness interpretation of the Equal Protection Clause. Instead, we suggest that this view is consistent with and rooted in—though perhaps not required by—a particular liberal conception of the relationship between the individual and the state. In this section, we explore this relationship

contradictory. . . . [I]n view that equates differentiation with discrimination, changing an unequal status quo is discrimination, but allowing it to exist is not.").

16 These arguments have come in several different variations, but they all support the recognition of a right to equality that goes beyond an antidiscrimination rationale. *See, e.g.*, Cass R. Sunstein, The Partial Constitution 338-46 (1993) (articulating an anticaste principle for understanding equality); Robin West, Progressive Constitutionalism: Reconstructing the Fourteenth Amendment 20-30 (1994) (stressing the protective aspect of the Equal Protection Clause).

17 *See Adarand Constructors*, 515 U.S. at 227 (holding that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny").

to lay a foundation for our argument in Part III regarding the regulation of state versus private power.

Liberal individualist principles have shaped the evolution of our constitutional doctrine as well as our shared conception of what it means to live in a democracy.[18] Though variously formulated, the central principles that characterize that discourse include the notions that individuals, and not groups, are the primary political units and bearers of rights;[19] that equality means, first and foremost, the right of every individual to "equal respect and concern" in pursuit of her conception of the good;[20] and that the state should not adopt any substantive conception of the good, but remain neutral among competing conceptions.[21] Underlying these three principles is the assumption that the individual is a fully self-determining, freely choosing subject.

So stated, these principles do not seem to have much to say about the formation and status of groups, such as the family, the community, or other subgroups within civil society. Indeed, critics have cited this inattention to the situatedness of the individual as an important limitation of our liberal democratic structure.[22] We contend, however, that the principles of autonomy and neutrality as embodied in our constitutional framework actually have a great deal to say about the politics of group identity. In fact, one could argue that difference,

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18 Perhaps the best support for this assertion comes from those who have argued over the last decade that we have all but ignored the republican roots of the Constitution. *See, e.g.*, MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 5-7 (1996) (describing republican theory as a rival public philosophy that liberalism displaced); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1494 & nn.4-5 (1988) (considering "how contemporary American constitutional understanding and analysis might benefit from serious and sympathetic . . . reflection upon the civic-republican strain in political thought").

19 *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1977) ("We might say that *individuals* have a right to equal concern and respect in the design and administration of the political institutions that govern them." (emphasis added)); John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 543 (1980) (describing the individual "citizens" as the only "self-originating sources of valid claims").

20 DWORKIN, *supra* note 19, at 182; *see also id.* (describing "a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice").

21 *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM *passim* (1993) (advocating a political conception of justice designed to establish the rules of social cooperation among individuals with divergent ideas of the good).

22 This criticism has come both from those who locate themselves within liberalism and from those outside. For an example of the former, see SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 7-8 (1989) (criticizing the inattention of contemporary theorists of justice to the relationship between the individual and the family, particularly the gender implications of that relationship). For an example of the latter, see SANDEL, *supra* note 18, at 6 (criticizing liberal political theory's disregard for the relationship between the individual and the community, particularly the implications of that relationship for democratic decision making).

including difference defined by group identity, is a central animating force behind our constitutional commitment to autonomy and neutrality. Viewed in this way, the problem is not silence with respect to group status or questions of identity, but the particular message conveyed by our liberal commitments.

To be more precise, many proponents of a limited, neutral state regard it as the innovation that permits democratic self-governance under conditions of cultural, moral, and religious diversity.[23] By maintaining both the neutrality and the thinness of the state, this conception simultaneously preserves social order and individual freedom.[24] According to this standard defense of liberalism, differences among citizens or groups of citizens within the polity justify—indeed require—a limited, neutral conception of state power.[25] In a sense, difference, and the inevitable disagreement it yields, is the problem to which the liberal state is the solution. The solution, in turn, is accomplished by defining difference as irrelevant to the public self, the citizen, and relegating it to the realm of the private. As Wendy Brown explains, "in a smooth and legitimate liberal order, if the particularistic 'I's' must remain unpoliticized, so also must the universalistic 'we' remain without specific context or aim, without a common good *other than* abstract universal representation or pluralism."[26] Any incursion of group identity into the realm of the political is viewed with suspicion. In the public sphere, "we" are undifferentiated citizens, sharing equally in our liberties and participating equally in collective self-government, with our differences conveniently relegated to the private

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23 For example, Rawls asks, "[H]ow is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?" RAWLS, *supra* note 21, at 4. For Rawls and others, the answer is political liberalism. *See id.*

24 This is more than an argument for liberalism as *modus vivendi*, a set of institutions designed to mediate among individuals pursuing their private interests. Rather, the argument captures an idealism centered on enlightenment or self-realization through autonomy. *See, e.g.*, George Kateb, *Democratic Individuality and the Claims of Politics*, 12 POL. THEORY 331, 332 (1984) (making an even stronger claim for fostering what he calls democratic individuality).

25 As Nancy Rosenblum explains, "where diverse and rival interests and opinions (and moral justifications) are inescapable, liberalism prescribes a framework of institutions and procedures to break the violence of faction, as James Madison instructed, by bringing them into the frame of government." Nancy L. Rosenblum, *Introduction* to LIBERALISM AND THE MORAL LIFE 6 (Nancy L. Rosenblum ed., 1989).

26 WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 57 (1995). In a similar move, Chantal Mouffe describes how Rawls's "notion of 'reasonable pluralism'" separates permissible differences that can flourish in the private sphere from unacceptable pluralism that "would jeopardize the dominance of liberal principles in the public sphere." Chantal Mouffe, *Democracy, Power, and the "Political," in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 245, 249 (Seyla Benhabib ed., 1996).

realm.[27] In short, the problem of difference is resolved through its privatization.

The liberal state is not inevitably hostile to the recognition of identity-based groups, or even to the assignment of rights based on group identity. Although historical and contemporary liberal thinkers have often viewed such groups as a threat to the polity,[28] it is possible to articulate liberal democratic justifications for group-conscious measures designed to foster substantive equality. Such policies might explicitly address identity-based differences bearing on inequality in a way that is fully consistent with a commitment to individual autonomy.[29] For example, a race-conscious measure such as the Voting Rights Act can be justified on the grounds of expanding individual autonomy through equal participation in the democratic process. It is also possible to accommodate within liberalism claims for special rights based on the distinctness of groups.[30] For example, granting autonomy to ethnic or national minorities such as Native Americans can be defended on liberal, individualist grounds of self-determination.[31]

More often, however, liberal thinkers consider the policies necessary to simultaneously respect difference and achieve substantive equality as entailing unacceptable departures from the core liberal values of autonomy and state neutrality. They view the assignment of rights based on group status, however justified in the particular, as a violation of the abstract principles of equal citizenship. This view has been particularly influential within the American political experience,

27 Brown goes further, arguing that "the social relations iterating class, sexuality, race, and gender would appear to be individualized through rights discourse, ascribed to persons as attribute or internal content rather than social effect." BROWN, *supra* note 26, at 115. In other words, in a liberal political order, difference is not merely privatized, but naturalized.

28 *See, e.g.*, JOHN STUART MILL, *Considerations on Representative Government*, *in* UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 171, 361 (Ernest Rhys ed., J.M. Dent & Sons 1910) (1861) (arguing that "[a]mong a people without fellow-feelings, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist").

29 Indeed, many liberals advocate such policies, defending them as essential to a thick conception of citizenship that forms the foundation to liberal democracy. *See, e.g.*, Jürgen Habermas, *Multiculturalism and the Liberal State*, 47 STAN. L. REV. 849, 849 (1995) (asking, "Should citizens' identities as members of ethnic, cultural, or religious groups *publicly* matter, and if so, how can collective identities make a difference within the frame of a constitutional democracy?").

30 For an interesting argument defending the recognition of rights of self-determination for national minorities, see WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 75 (1995) (arguing that "respecting minority rights can enlarge the freedom of individuals, because freedom is intimately linked with and dependent on culture").

31 *See id.* at 38-40 (discussing the group-based claims of Native Americans under the U.S. Constitution).

and it is not difficult to see why. The definition of individual particularity as irrelevant to political personhood is a direct reaction to domination effected through the assignment of political privilege according to that particularity. This is precisely the type of regime Justice Harlan criticized in *Plessy*. Freedom or liberty in this context has understandably come to be defined as the discounting of private inequality in the name of universal citizenship.

The most frequently cited articulation of this principle is the Supreme Court's decision in *Brown v. Board of Education*.[32] In *Brown*, the Court rejected the separate but equal doctrine in public education.[33] The Court was highly sensitive to the context and social meaning of segregated schools; it recognized both the profound material and symbolic inequality of the system and the connection between that inequality and the racial subordination that the Equal Protection Clause was intended to address.[34]

Over the decades that followed, however, the Supreme Court has increasingly disregarded the context of *Brown* and has come to see the decision as endorsement of a standard of color-blindness. Relying on this misreading of *Brown*, the Supreme Court has embraced the idea that the problem addressed by the constitutional guarantee of equal protection is not group-based inequality, but rather its official recognition.[35] For example, in the area of voting rights, the Court warned in *Shaw v. Reno*[36] that "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire."[37] This warning contains two important points: First, identity-based groups are dangerous to the Nation; they threaten to balkanize us into competing factions. Second, official recognition of the existence of such groups through race-conscious districting will reify that harm. With the threat thus characterized, the appropriate approach for the state is to ignore the issue and to close its eyes to the racial pattern.

In the Court's view, state acknowledgment of collective identity is threatening not only to the polity, but also to the individual. For ex-

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32 347 U.S. 483 (1954).

33 *See id.* at 495.

34 *See id.* at 494 (noting that separating children "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

35 *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 904 (1995) (citing *Brown*—albeit with a "see also" signal—for the proposition that the central mandate of the Equal Protection Clause is "racial neutrality in governmental decisionmaking").

36 509 U.S. 630 (1993).

37 *Id.* at 657.

ample, in *Miller v. Johnson*,[38] the Court characterized the view that individuals of the same race share a single political interest as "'based on the demeaning notion that members of the defined racial groups ascribe to certain "minority views" that must be different from those of other citizens.'"[39] In other words, the harm is the insult to the individual that stems from the official assumption that group-based characteristics define the individual. The Court defined state-sponsored discrimination not in terms of oppression but stereotyping—the mistaken assumption that difference matters.

This conception of equal protection perhaps found its clearest articulation in Justice Powell's opinion in *Regents of the University of California v. Bakke*.[40] Justice Powell explained: "If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently."[41] In contrast to the contextualized—and therefore complex—formulation of "discrete and insular minority," this construction has the advantage, in Justice Powell's view, of formal equality.[42] The "insult" of being judged on the basis of group identity can, in theory, be visited equally on all—black or white, male or female. Defined this way, the state's equal protection obligation is fully consistent with a commitment to equal concern and respect for all citizens.

When the harm of discrimination is so defined, the solution lies not in policies geared toward substantive equality (or even meaningful equality of opportunity), but rather in group-blindness. This solution, in turn, is consistent with a liberal emphasis on the individual as rights-bearer and political actor. This liberal ideal has informed the Supreme Court's application of equal protection principles. Dissenting in *Metro Broadcasting, Inc. v. FCC*,[43] Justice O'Connor argued that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as *individuals*, not as simply components of a racial, religious, sexual or na-

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38 515 U.S. 900 (1995).

39 *Id.* at 914 (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 636 (Kennedy, J., dissenting)).

40 438 U.S. 265 (1978).

41 *Id.* at 299.

42 *See id.* (noting that "constitutional standards may be applied *consistently*" (emphasis added)).

43 497 U.S. 547 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

tional class.'"[44] Five years later, Justice O'Connor's was the majority view. In *Adarand Constructors, Inc. v. Pena*,[45] she wrote:

> [T]he basic principle [is] that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race—a *group* classification long recognized as "in most circumstances irrelevant and therefore prohibited" . . . —should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.[46]

In sum, in its interpretation of the Equal Protection Clause, the Court has gradually embraced a norm of group-blindness, defined from the state's point of view. Differences among groups will surely persist (or, in the language of liberal pluralism, "flourish") in the private sector. This is to be both celebrated as a product of the free choices of self-determining individuals and sometimes regretted as an unfortunate consequence of that freedom. The liberal state, however, must regard individuals as equal, indeed interchangeable, for purposes of public citizenship, the allocation of public resources, rights, and democratic participation. As the Court stated succinctly in *Miller v. Johnson*, the Fourteenth Amendment's "central mandate is racial neutrality in governmental decisionmaking."[47]

We summarize this familiar doctrinal evolution and its liberal roots not so much to criticize it (though we are tempted), but to argue for its limitation. Specifically, we suggest that the liberalism-inspired move toward a group-blindness standard is dictated by a particular view of the relationship between the state and its citizens. This standard has no necessary application to the regulation of private discrimination; nevertheless courts have increasingly adopted it in that context as well.[48] In the next Part, we trace the encroachment of a group-blindness approach into the doctrinal development of Title VII. Then in Part III, we sketch our preliminary argument regarding

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44 *Id.* at 602 (O'Connor, J., dissenting) (quoting Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1083 (1983) (internal quotation marks omitted)).

45 515 U.S. 200 (1995).

46 *Id.* at 227 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

47 Miller v. Johnson, 515 U.S. 900, 904 (1995).

48 Consider Justice Scalia's concurrence in *Adarand*. Although he endorsed a colorblind standard, he linked it to the state's point of view:

> Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual. . . . *In the eyes of government, we are just one race here.* It is American.

Adarand Constructors, 515 U.S. at 239 (Scalia, J., concurring) (emphasis added).

the distinction between the regulation of public and private action with respect to race or other identity-based categories.

II
DIFFERENCE AND THE REGULATION OF PRIVATE CHOICE

Race consciousness—or consciousness of the connection among race, employment decisions, and segregation of the workplace—motivated Congress to enact Title VII and has shaped the development of the statute's doctrine.[49] As the House Report stated, the goal of Title VII was "to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin,"[50] with sex subsequently added to the list. Later employment discrimination laws, such as the Age Discrimination in Employment Act[51] (ADEA) and the Americans with Disabilities Act of 1990[52] (ADA), shared similar goals.

Consistent with this purpose, the standards of liability and available remedies under Title VII have, from the outset, reflected a consciousness of group status or identity. In some circumstances, courts have interpreted Title VII as obliging race-conscious action by employers, prompting, for instance, the development of hiring standards that reflect an awareness of their effect on the racial composition of the work force.[53] In other circumstances, courts have permitted employers to use race-conscious strategies for constructive purposes, such as adopting voluntary affirmative action plans.[54] Even in the individualized disparate treatment context, the case law has implicitly recog-

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[49] In *United Steelworkers v. Weber*, 443 U.S. 193 (1979), the Supreme Court held more specifically that "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with 'the plight of the Negro in our economy.'" *Id.* at 202 (quoting 110 CONG. REC. 6548 (1964) (statement of Sen. Humphrey)).

[50] H.R. REP. No. 88-914, pt. 1, at 26 (1963).

[51] 29 U.S.C. §§ 621-634 (1994 & Supp. III 1997).

[52] 42 U.S.C. §§ 12101-12213 (1994 & Supp. III 1997).

[53] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 431-36 (1971) (allowing plaintiffs to challenge under Title VII facially neutral hiring practices that have a disparate impact on identifiable protected groups).

The Reagan and Bush Administrations pointed to the imposition of race conscious standards in disparate impact litigation to insist that Title VII promoted hiring quotas; President Bush vetoed the Civil Rights Act of 1991 on this basis. *See* Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487, 1489 (1996); Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305, 309 (1983). Nevertheless, the argument that Title VII obliges employers to be conscious of the racial impact of hiring criteria does not lead to the conclusion that such a standard promotes quotas.

[54] *See* United Steelworkers v. Weber, 443 U.S. 193, 208-09 (1979) (holding that Title VII permits voluntary affirmative action by employers that is consistent with the purposes of the statute).

nized the impossibility of a race-blindness standard for evaluating employer decision making.[55] Yet in each of these areas, courts have increasingly moved toward a standard of group-blindness or employer neutrality toward race as defining the antidiscrimination norm. This doctrinal movement toward group-blindness or employer neutrality has restricted the ways in which an employer might constructively consider race in developing hiring policies, and has ignored the inevitability of race consciousness in individualized employment decisions. This Part analyzes examples that illustrate this doctrinal development.

A. The Decline of Disparate Impact

Disparate impact doctrine is the area of federal employment discrimination law that most directly emphasizes group identity and its relationship to employment patterns. The relevant harm under a disparate impact theory is the measurable differential effect of an employer's hiring practice on a particular protected group. The simple idea behind this doctrine is that employment practices that disproportionately disadvantage or exclude members of certain groups must be eliminated unless justified by business necessity. Employers are responsible for the removal of such barriers whether or not they were erected for exclusionary purposes. So defined, disparate impact doctrine imposes an obligation on employers to act with a consciousness of race and to design hiring and promotion procedures that will minimize the exclusion of particular racial groups. The standard is one of neutrality of impact, not neutrality of intent.

In the first two decades after the passage of Title VII, many commentators believed that disparate impact cases would eventually assume a greater role than disparate treatment cases in ending employment discrimination.[56] They believed that courts had addressed the most egregious disparate treatment cases during the decade following passage of Title VII, thus creating an opportunity for courts to turn to more subtle forms of discrimination.[57] However, this opportunity did not materialize with any force. Plaintiffs still bring the vast majority of Title VII cases under a disparate treatment theory, while disparate impact cases have become exceedingly rare.

The decline of the disparate impact theory can be traced to a movement away from the standard first set out by the Supreme Court in *Griggs v. Duke Power Co.*[58] In *Griggs*, the Court held that an em-

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55 *See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981) (discussing the function of the burden-shifting framework).

56 *See, e.g.*, Alfred W. Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 62-63 (1972); Chamallas, *supra* note 53, at 310-12.

57 *See* Chamallas, *supra* note 53, at 310 & nn.20-21.

58 401 U.S. 424 (1971).

ployer's facially neutral employment practices could violate Title VII if the practices negatively affected a disproportionate number of people in a protected group and the employer could not prove that the practices were necessary to achieve a legitimate business goal.[59] Accordingly, the Court did not require disparate impact plaintiffs to prove discriminatory intent. Instead, they could prevail by establishing a clear pattern of group-based discriminatory impact that was not justified by business necessity.[60] This standard forced employers to tailor employment criteria narrowly with an awareness of their race or gender implications. Under this standard, employment criteria had to "measure the person for the job and not the person in the abstract."[61]

The Court's subsequent decisions have gradually increased the plaintiff's burden of proof in disparate impact cases; neutrality of impact is now measured according to the specific employment criteria, rather than the broader discernable impact on the employer's work force.[62] Under this standard, plaintiffs must prove the specific technique of discriminatory practices; plaintiffs cannot just identify the consequences and expect the employer to explain the practice on business grounds. Moreover, plaintiffs can no longer rely on the proportion of minorities in the general population as a baseline for measuring disparate impact. Instead, plaintiffs must calculate the racial composition of "the qualified . . . population in the relevant labor market."[63]

This has proven to be a difficult standard to meet in the lower courts. For example, in *Vitug v. Multistate Tax Commission*,[64] a Filipino plaintiff attempted to show that his former employer's "word-of-

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59 *See id.* at 431.

60 *See id.* at 432. The Court explained that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.*

Some commentators have noted that this heightened standard for disparate impact actually blurs the line between disparate impact and disparate treatment cases. *See* Ayres & Siegelman, *supra* note 53, at 1491-94.

61 *Griggs*, 401 U.S. at 436.

62 *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (plurality opinion) ("[T]he plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. . . . [T]he plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."); *see also* Ramona L. Paetzold & Steven L. Willborn, *Deconstructing Disparate Impact: A View of the Model Through New Lenses*, 74 N.C. L. Rev. 325, 346 & n.55 (1996) ("The Supreme Court . . . [made] clear that it is part of the plaintiff's burden to indicate the particular screening level that produces the disparate impact. Evidence of a disparate impact at the bottom line, without more, is insufficient to make out a prima facie case.").

63 Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977).

64 88 F.3d 506 (7th Cir. 1996).

mouth recruitment and subjective interview evaluations directly result[ed] in a disproportionate failure to hire or promote Asian or Catholic applicants."[65] The Seventh Circuit, however, found that the plaintiff had failed to establish even a prima facie case of disparate impact because the plaintiff's expert witnesses had not identified a specific employment criterion that resulted in any statistical disparity.[66] Instead, the plaintiff's experts had found that the overall hiring practice was a poor indicator of a candidate's ability, introduced arbitrariness into the recruiting process, and permitted favoritism.[67] The court rejected this evidence: "[The expert's] conclusions . . . support only the inference that [the employer]'s selection process is subjective—at worst, that it is arbitrary and unreliable. But arbitrariness alone does not amount to discrimination."[68] In short, the *Vitug* court acknowledged that the employment practice was unnecessary and problematic, but refused to credit the plaintiff's link between the practice and the collective experiences of Catholics and Asians.

Even when a plaintiff establishes a prima facie case of disparate impact, courts have become more willing to accept explanations other than discrimination for unequal hiring practices. For example, defendants have been increasingly successful in raising a "lack-of-interest" defense. Under this defense, employers claim that statistical disparities in employment reflect patterns of individual choice rather than unfair hiring practices. In perhaps the most notorious example, Sears successfully argued that gender segregation in its work force was a result of women's preference for lower risk, lower paying, noncommission sales jobs.[69] Professor Vicki Schultz has thoroughly documented employers' use of such defenses and courts' responses to them in sex discrimination cases from 1972 to 1989.[70] Her results, viewed from the perspective of our analysis, confirm the judicial trend toward further narrowing disparate impact causes of action. In lack-of-interest defense cases, courts are willing to see group-based employment patterns. However, rather than ascribe those patterns to discrimination, courts naturalize them by attributing them to individuals' free exercise of private choice. Courts characterize the employer's actions as neutral in intent, though not in outcome, and the unequal hiring pattern as a by-product of group differences for which the employer is not responsible.

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65 *Id.* at 513.

66 *See id.* at 513-14.

67 *See id.* at 514.

68 *Id.*

69 *See* EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988).

70 *See* Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

B. Modifying the Burden-Shifting Framework

In the disparate treatment context, the move toward a colorblindness or employer neutrality standard is more subtle but no less significant. From the outset, litigation of disparate treatment cases has reflected the reality that individual employment decisions are virtually never race or gender blind. The Supreme Court acknowledged as much in *McDonnell Douglas Corp. v. Green*[71] by developing a burden-shifting framework for these cases based on an individual plaintiff's group status.[72] Under this framework, a disparate treatment plaintiff could prove discrimination either by offering direct evidence of discriminatory intent, or by establishing that her employer had treated her less favorably than members of other groups and had provided a pretextual explanation for that treatment.[73] In other words, it was enough for a plaintiff to show that she had been treated differently and that the employer had lied about the reason for this treatment. From this evidence, the fact finder could reasonably conclude that the plaintiff had been the target of illegal discrimination.

The *McDonnell Douglas* framework was premised on a particular assumption about the prevalence of discrimination and the realization of the difficulties faced by plaintiffs in proving discriminatory intent. If a plaintiff could show that she was treated unfavorably, the court would look to the employer for an explanation of the reasons behind that treatment. If the employer then provided a false explanation, the fact finder could reasonably conclude that the false explanation was a pretext for illegal discrimination.[74] Over the past decade, several circuit courts have chipped away at the *McDonnell Douglas* framework, holding that disparate treatment plaintiffs must provide direct evidence of impermissible employer discrimination in addition to showing employer pretext.[75] This "pretext-plus" modification to the burden-shifting framework reflects a move away from the basic as-

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71 411 U.S. 792 (1973).

72 *See id.* at 802-05.

73 *See id.*; *see also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981) ("The plaintiff . . . may succeed . . . either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.").

74 In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), the Supreme Court held that a Title VII plaintiff who proved that an employer's reason was pretextual was not necessarily entitled to judgment. *See id.* at 509-11. *Hicks* establishes that evidence in addition to pretext might be required to meet the plaintiff's burden of persuasion. The case, however, does not support the pretext-plus approach as described below.

75 Currently, the First, Second, Fourth, Fifth, and Eighth Circuits explicitly follow a pretext-plus approach. *See* Hidalgo v. Overseas Condado Ins. Agencies, Inc., 120 F.3d 328, 335-37 (1st Cir. 1997); Fisher v. Vassar College, 114 F.3d 1332, 1337-40 (2d Cir. 1997) (en banc); Ryther v. KARE 11, 108 F.3d 832, 836-38 (8th Cir. 1997) (en banc); Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994-95 (5th Cir. 1996) (en banc); Jiminez v. Mary Washington College, 57 F.3d 369, 377–78 (4th Cir. 1995).

sumptions about the prevalence of discrimination. Courts adopting this approach are simply less willing to conclude that a showing of disparate treatment, coupled with an employer's pretextual explanation, establishes a claim of discrimination.

Although the terminology can be rather technical, the debate in the courts over pretext can easily be translated into a question of the meaning ascribed to an employer's apparently group-based choices coupled with misrepresentation or obfuscation of those choices. When an employer rejects a qualified African-American applicant in favor of a white applicant and then offers an explanation for the decision that is implausible, misleading, or deliberately false, what conclusion should the fact finder be permitted to draw? Under the original *McDonnell Douglas* approach, in a slim majority of circuit courts,[76] the plaintiff can today survive summary judgment either by offering direct evidence of discriminatory intent, or by showing that the employer's explanation is false. These courts assume that, by giving a false or implausible rationale for the hiring decision, the employer may be attempting to conceal impermissible race-based hiring practices. Thus, they generally consider evidence of such falsehood sufficient to support a finding of discrimination.[77]

In contrast, pretext-plus courts require additional direct evidence of discrimination from the plaintiff, beyond any evidence of falsehood, to survive an employer's motions for summary judgment or directed verdict. In effect, the difference between pretext-plus and pretext-only courts is rooted in background assumptions about the prevalence of discrimination and about whether an employer's pretextual explanation is an attempt to conceal that discrimination.

For example, in *Fisher v. Vassar College*,[78] the Second Circuit reversed a district court judgment that Vassar College had violated Title VII and the ADEA when it denied tenure to a married female biology professor over the age of forty.[79] The Second Circuit agreed with the district court that the plaintiff had established a prima facie case of discrimination and had shown that some of the College's assertions

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76 Currently, the Third, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits generally follow a pretext-only approach, at least when considering motions for summary judgment. *See* Sheehan v. Donlen Corp., 173 F.3d 1039, 1044-47 (7th Cir. 1999); Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1294 (D.C. Cir. 1998); Arrington v. Cobb County, 139 F.3d 865, 875 (11th Cir. 1998); Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1066–72 (3d Cir. 1996) (en banc); Randle v. City of Aurora, 69 F.3d 441, 451-53 (10th Cir. 1995); Huguley v. General Motors Corp., 52 F.3d 1364, 1370-72 (6th Cir. 1995); Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993).

77 *See, e.g.*, *Aka*, 156 F.3d at 1290 (rejecting "[a] reading of *Hicks* under which employment discrimination plaintiffs would be routinely required to submit evidence over and above rebutting the employer's stated explanation in order to avoid summary judgment").

78 114 F.3d 1332 (2d Cir. 1997) (en banc).

79 *See id.* at 1333-34.

about her qualifications—the alleged nondiscriminatory reason for the denial of tenure—were false.[80] However, the en banc court followed the earlier panel decision in finding that the plaintiff's showing of pretext "'points nowhere.'"[81] In coming to this conclusion, the Second Circuit did not consider the College's pretext in relation to the plaintiff's group status. Specifically, it did not consider the inferences that could be drawn from the fact that the College lied about a member of a group that had historically been denied tenure—older, married women. Nor did the court consider the inferences that could be drawn from the College's more favorable treatment of other groups. Rather, the court focused simply on whether the plaintiff had provided any direct evidence of discrimination aimed at her as an individual. When the court found that the plaintiff had not, it concluded that no reasonable fact finder could have found discrimination and reversed the lower court verdict.[82]

Pretext-plus courts have similarly disregarded plaintiffs' group status even when considering policies explicitly addressing group membership. In *Hidalgo v. Overseas Condado Insurance Agencies, Inc.*,[83] for example, the First Circuit granted summary judgment for an employer who sent the plaintiff a letter asking him to retire on his sixty-fifth birthday, "[i]n accordance with the company's established guidelines."[84] The plaintiff told his employer that he did not intend to retire on that date.[85] Approximately three months later, the employer informed the plaintiff that his division would cease to exist as of the date of his sixty-fifth birthday and that his contract would not be extended after that date.[86] The plaintiff once again informed his employer of his desire to continue working, but the employer refused. The plaintiff subsequently filed an ADEA case against the employer, and the employer eventually moved for summary judgment.[87]

In a pretext-only court, the *Hidalgo* plaintiff most likely would have survived the employer's motion for summary judgment. Indeed, the *Hidalgo* court assumed that the plaintiff had established a prima facie case of discrimination: (1) the plaintiff was in the class of persons protected by the ADEA (persons over forty years of age); (2) he was qualified for the position at issue; (3) his contract was not extended; and (4) his work continued to be performed by younger employees even after his division was eliminated and his contract was

80 *See id.* at 1344-45.
81 *Id.* at 1345 (quoting Fisher v. Vassar College, 70 F.3d 1420, 1437 (2d Cir. 1995)).
82 *See id.* at 1347.
83 120 F.3d 328 (1st Cir. 1997).
84 *Id.* at 331 (alteration in original) (internal quotation marks omitted).
85 *See id.*
86 *See id.*
87 *See id.*

allowed to lapse.[88] The *Hidalgo* court also assumed, with hesitation, that the employer's proffered reasons for firing the plaintiff—that the plaintiff's division was closed because it was unprofitable and that customers had complained about plaintiff's interpersonal skills—were pretextual, given evidence in the record contradicting the employer's assertions.[89] Both of the court's assumptions seem reasonable. The employer sent the plaintiff a letter asking him to retire because of a company policy specifically aimed at those employees reaching sixty-five years of age; the employer did not announce its intention to close plaintiff's division or discuss the division's lack of profitability until plaintiff refused to retire; and the division's work, including plaintiff's, was reassigned to other, younger employees.[90] Moreover, plaintiff introduced evidence indicating that, prior to receiving the employer's letter, all of his performance reviews were more than satisfactory and that he had never been informed of the alleged complaints against him.[91] A pretext-only court likely would have found that this evidence was sufficient to allow the plaintiff to take his case to the fact finder to determine whether the employer was motivated by discriminatory intent.

The *Hidalgo* court, however, granted summary judgment for the employer; it found that the plaintiff had not submitted sufficient evidence to indicate that the employer's pretext masked discriminatory intent.[92] In reaching this decision, the court almost entirely ignored the factual basis the of the plaintiff's prima facie case. The court did not think that the employer had treated the plaintiff, an older worker, differently from other workers. Rather, the court focused on the evidence submitted by the plaintiff to refute the employer's stated reasons for the adverse employment action. Despite the letter asking the plaintiff to retire at age sixty-five, the court found that the plaintiff "offered no evidence that reasonably could be construed to indicate that [the employer] intended to discriminate against him because of his age."[93] The court stated that the letter only indicated the employer's expectation that its employees retire at age sixty-five and therefore was not "significantly probative . . . or even minimally sufficient . . . circumstantial evidence to permit a reasonable jury to find discriminatory animus on [the employer's] part."[94] Although the employer's policy targeted a group to which the plaintiff belonged, and the employer lied to the plaintiff when he refused to follow that pol-

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88 *See id.* at 332-38.

89 *See id.* at 337.

90 *See id.* at 336.

91 *See id.* at 336-37.

92 *See id.* at 338.

93 *Id.* at 337.

94 *Id.* at 337-38 (internal quotation marks omitted) (citations omitted).

icy, the pretext-plus court found that there could be no finding of discrimination because the plaintiff did not submit evidence of discrimination specifically directed at him as an individual.[95]

Contrary to the purpose of the original burden-shifting framework, such cases ignore the fact that employers are aware of factors such as race, gender, or disability, when they make employment decisions. For example, in suggesting that the plaintiff's showing of pretext "points nowhere" in *Vassar*,[96] the Second Circuit acknowledged that Vassar College might have lied. Nonetheless, it agreed with the earlier panel decision that such lies were not evidence of discrimination because there was no direct evidence linking the lies to the plaintiff's group status. As the court stated, "[i]ndividual decision-makers may intentionally dissemble in order to hide a reason that is non-discriminatory but unbecoming or small-minded, such as back-scratching, log-rolling, horse-trading, institutional politics, envy, nepotism, spite, or personal hostility."[97] The court did not consider how such small-mindedness or personal hostility might be affected by the fact that the plaintiff was a member of a group that had historically been denied tenure. Rather, the court seemed content with the possibility that the College's pretext could mask a variety of personal weaknesses other than group-based treatment.

In *Reeves v. Sanderson Plumbing Products, Inc.*, the Supreme Court recently rejected the most extreme version of the pretext-plus approach—that a plaintiff's prima facie case plus a showing of pretext is insufficient to support a finding of discrimination as a matter of law.[98] On the other hand, the Court stopped short of holding that such a showing necessarily entitles a plaintiff to survive summary judgment. Indeed, the Court cited *Vassar* as an example of a situation where summary judgment was appropriate. Thus, *Reeves* appears to leave substantial latitude for lower courts to express their skepticism toward allegations of discriminatory intent.

Courts' willingness to credit motivations other than discrimination for an employer's pretextual explanation of a hiring decision accords with courts' acceptance of a lack-of-interest defense in disparate impact cases. In both types of cases, courts are increasingly willing to regard employers' decisions as neutral with respect to group-based characteristics such as race or gender and to view the seemingly identity-based consequences of those decisions as resulting from nondiscriminatory or color-blind factors. The doctrinal trend is toward

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95 *See id.*

96 *See supra* note 81 and accompanying text.

97 Fisher v. Vassar College, 114 F.3d 1332, 1337 (2d Cir. 1997) (en banc).

98 *See* Reeves v. Sanderson Plumbing Prods., Inc., No. 99-536, 2000 U.S. LEXIS 3966, at *26-27 (June 12, 2000).

accepting formally neutral decisions at face value and viewing instances of discrimination as anomalous and irrational.

C. Voluntary Affirmative Action

The changes described above in both the disparate impact and disparate treatment doctrines reflect a reluctance by courts to view facially neutral policies as discriminatory, even when they affect employees in a seemingly gender- or race-specific way. At the same time, courts have become increasingly vigilant with respect to another type of departure from neutrality by employers—voluntary affirmative action. Recent cases imposing limitations on voluntary affirmative action reinforce the notion that the antidiscrimination standard embodied in Title VII is a standard of group-blindness or employer neutrality. Moreover, it is in this area that the courts' language has come most closely to parallel equal protection doctrine.

In *United Steelworkers v. Weber*,[99] the Supreme Court held that voluntary affirmative action programs in private employment were permissible under Title VII.[100] The Court noted that the primary purpose behind Title VII was to expand economic opportunities for African Americans; it held that "an interpretation of [Title VII] that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute' and must be rejected."[101] Under *Weber*, employers' affirmative action plans were legitimate so long as "[t]he purposes of the plan mirror[ed] those of the statute"[102] and did not "unnecessarily trammel the interests of the white employees."[103] The plan in *Weber*, which involved hiring goals, on-the-job training, and race-based hiring preferences for new trainees, was upheld by the Court under this standard.[104]

In *Johnson v. Transportation Agency*,[105] the Court applied the *Weber* standard to approve a public employer's affirmative action plan in which gender was one factor in the selection of candidates for traditionally male-dominated positions.[106] The Court also addressed the distinction between the Title VII standard and the equal protection

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99 443 U.S. 193 (1979).

100 Voluntary affirmative action plans are those undertaken by an employer other than in response to a court order or Title VII suit. In this sense, they are not strictly remedial and need not entail an admission by the employer of past wrongdoing. *See id.* at 200; *see also id.* at 210-11 (Blackmun, J., concurring) (expressing concern that, without voluntary affirmative action, employers walk on a "'tightrope'" between admitting past violations and preventing future ones).

101 *Id.* at 202 (citation omitted).

102 *Id.* at 208.

103 *Id.*

104 *See id.* at 208-09.

105 480 U.S. 616 (1987).

106 *See id.* at 641-42.

standard. It held that, although the equal protection standard was higher,[107] the Title VII standard applied equally to both public and private employers and operated independently of the equal protection standard.[108]

Notwithstanding the clear language in *Johnson*, lower courts have increasingly collapsed the two standards, effectively limiting the scope of voluntary affirmative action by private employers under Title VII. For example, in *Taxman v. Board of Education*,[109] the school board of Piscataway, New Jersey, eliminated a teaching position from the business department.[110] In order to provide racial diversity in an all-white department, the school board decided to retain an African-American teacher over an equally qualified white teacher.[111] The white teacher, Taxman, sued the school board, alleging that its actions had violated Title VII.[112] The Third Circuit agreed with Taxman, holding that the affirmative action plan discriminated against her because the plan was nonremedial and involved a layoff.[113] In reaching this conclusion, the Third Circuit interpreted the scope of affirmative action permitted under Title VII very narrowly, limiting it to only those situations when necessary to remedy past discrimination.[114] In applying this standard, the court came much closer to the strict scrutiny color-blindness rationale the Supreme Court adopted in *Wygant*[115] and reaffirmed in *Adarand*,[116] than the more flexible Title VII approach in *Weber* and *Johnson*.[117]

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107 *See id.* at 627 n.6. The equal protection standard seems to be higher in most respects. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273-74 (1986) (plurality opinion) (holding that strict scrutiny applies to racial categories under the Equal Protection Clause even when the classification benefits minorities). However, to the extent that diversity survives as a justification for racial classifications under *Bakke*, the Equal Protection Clause might permit some types of affirmative action forbidden under recent interpretations of Title VII. *See* Taxman v. Board of Educ., 91 F.3d 1547, 1550 (3d Cir. 1996) (holding that "a non-remedial affirmative action plan, even one with a laudable purpose, cannot pass muster").

108 *See Johnson*, 480 U.S. at 628 n.6 (noting that "[t]he fact that a public employer must also satisfy the Constitution does not negate the fact that the *statutory* prohibition with which that employer must contend *was not intended to extend as far as that of the Constitution*" (emphasis added)).

109 91 F.3d 1547 (3d Cir. 1996).

110 *See id.* at 1551.

111 *See id.* at 1551-52.

112 *See id.* at 1552.

113 *See id.* at 1563-65.

114 *See id.* at 1557-58.

115 *See supra* note 107.

116 *See supra* notes 43-47 and accompanying text.

117 The implications of the *Taxman* holding for the future of voluntary affirmative action by private employers are not clear. The Supreme Court granted certiorari in *Taxman*, *see* Piscataway Township Bd. of Educ. v. Taxman, 521 U.S. 1117 (1997), but due to the encouragement from civil rights groups who feared that the Court would adopt the Third Circuit reasoning, the school board reached a settlement prior to oral argument, *see* Piscat-

Together, the Third Circuit's approach in *Taxman*, the Second Circuit's pretext-plus analysis in *Vassar College*, and the Seventh Circuit's acceptance of the lack-of-interest defense in *EEOC v. Sears* illustrate a broader trend in Title VII litigation. Courts are increasingly willing to tolerate a range of questionable but facially group-blind explanations for employment decisions that disadvantage minorities and women. At the same time, courts are becoming less tolerant of any explicit use of racial preferences by employers regardless of the justification. This pattern parallels the Supreme Court's changing approach to equal protection, moving away from a contextual analysis of inequality and toward a purely formal color-blindness standard. In both types of cases, the Court now considers the principal harm to be acknowledging race rather than perpetuating inequality.

III
Liberalism and the Relationship Between Title VII and Equal Protection

In Part I, we suggested that, in constitutional interpretation, the Supreme Court's standard of group-blindness seems motivated by a powerful commitment to state neutrality toward group status; that commitment, in turn, stems from underlying liberal principles. The notion that all citizens are equal in the eyes of the state is coupled with the concern that if the state notices or takes account of difference, it risks reifying difference, and hence inequality. Put differently, the color-blindness norm is premised on the notion that there is harm in state recognition of identity. In Part II, we argued that courts are extending the norm of color-blindness, though often subtly and implicitly, to the analysis and regulation of private acts of discrimination. Relying in part on the distinction between public and private uses of difference, we shall argue in this Part that this extension of the standard is inappropriate.

Whatever the problems with the Supreme Court's embrace of a standard of group-blindness in its interpretation of the Equal Protection Clause, this doctrinal development does not require acceptance of such a standard in the regulation of private conduct. This is true both as a legal matter and as a conceptual matter. First, as a matter of constitutional law, nothing in the Equal Protection Clause requires the state to regulate private conduct by imposing its standard on pri-

away Township Bd. of Educ. v. Taxman, 522 U.S. 1010 (1997) (dismissing certiorari). For a discussion of *Taxman* and the distinction between Title VII and equal protection approaches to affirmative action, see Mary E. Westby, Comment, Taxman v. Board of Education*: The Conflation of Equal Protection and Title VII Standards in Affirmative Action*, 1998 Utah L. Rev. 331, 333-50.

vate decision makers.[118] For example, notwithstanding *Adarand*, there would be no equal protection objection to a statute awarding preferences to government contractors whose work force mirrors the racial or gender composition of the relevant labor pool, or even the local population.[119] Similarly, there would be no equal protection objection to a federal statute permitting an employee to establish a claim of discrimination against his employer based on an adverse employment decision, coupled with a showing of generalized racial imbalance in the employer's work force.[120] Both policies would be group-blind from the standpoint of the state, since they treat all groups in a formally equal way and draw no explicit lines on the basis of race or gender. That they require race-conscious recruitment and training on the part of private contractors does not violate the group-blind norm as applied to state actors.

This observation raises the more difficult conceptual question: To what extent is a group-blind norm appropriate in the regulation of private conduct? A complete answer to this question is beyond the scope of this Essay. Nevertheless, we offer a partial answer by arguing that the conception of group-blindness on the part of the state, which underlies the Court's equal protection jurisprndence, does not support such a norm in the private realm. Instead, the court must theorize a separate standard of group-blindness or employer neutrality toward race in the private context by taking into account both a range of factors that distinguish the private from the public and the goals of antidiscrimination legislation.

In Part I, we identified two important justifications for the group-blindness standard articulated by the Supreme Court in the context of equal protection: (1) a vision of public citizens as undifferentiated and equal before the law, with differences relegated to the private sphere,[121] and (2) a commitment to state neutrality with respect to group identity.[122] Recalling examples from Part II which demonstrate

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118 *See, e.g.*, Johnson v. Transportation Agency, 480 U.S. 616, 627 n.6 (1987) (distinguishing between Title VI, which Congress intended to track constitutional standards and adopted pursuant to its Section 5 power, and Title VII, which Congress directed at purely private conduct and passed pursuant to its power under the Commerce Clause).

119 In *Adarand*, the challenged program targeted socially and economically disadvantaged individuals, but created a presumption that members of certain minority groups fell within the scope of that definition. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 208-09 (1995).

120 Indeed, this standard comes close to the disparate impact standard that the Court articulated in *Griggs*, but subsequently limited. *Compare* Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971) (accepting general statistics regarding the racial composition of the work force), *with* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 651-52 (1989) (requiring a more specific statistical showing regarding the racial composition of the qualified applicant pool).

121 *See supra* notes 26-27 and accompanying text.

122 *See supra* notes 21, 23-25.

how these principles have been translated to the private sphere, we attempt to show the inappropriateness of the group-blindness standard under Title VII and argue for the necessity of group-consciousness within the private sphere.

A. Public Citizen and Private Choice

Translating the concept of the undifferentiated public citizen to the private workplace leads to a view of the workplace as a public, neutral sphere where differences are irrelevant or emerge only as an expression of private preference. This view is already reflected in the increasing skepticism of courts towards claims of discrimination as explanations for unequal hiring patterns or disparate treatment of individuals.[123] Courts have imposed a heavy burden on plaintiffs, both in disparate impact and disparate treatment cases, to show precisely how their injury—from not being hired, not being promoted, being paid less, or being denied tenure—was due to their difference and not to some suspect, but nonetheless legally acceptable, reason or mere happenstance.[124] Moreover, courts are increasingly accepting alternative, nondiscriminatory explanations of suspect employment patterns premised on the operation of difference through private choice.[125] This doctrinal development assumes that individual preferences pre-exist interaction between the employer and the labor force and that the employer is not responsible for shaping or even responding to those preferences. In this sense, cases involving the lack-of-interest defense parallel the Supreme Court's assumption in the equal protection context that difference is prior to politics. The analysis substitutes the employer for the state, but otherwise remains the same: difference results from the expression of private preferences; the employer is not complicit; and the remedy is neutrality.

Despite the parallel structure of the analysis and the ease with which courts have adopted it, any doubts one might harbor about the possibility of truly color-blind government policies are magnified in the context of private employment decisions. In statewide or nationwide policy decisions reflected in legislation, racial or gender implications may be deliberately veiled, incidental, or genuinely unintended.[126] No such doubt exists with respect to the group-con-

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123 *See supra* Part II (discussing parallel trends in disparate treatment and disparate impact cases).

124 *See supra* notes 75, 78-97 and accompanying text (discussing the pretext-plus approach in disparate treatment cases).

125 *See supra* notes 69-70 and accompanying text (discussing the emergence of the lack-of-interest defense in disparate impact cases).

126 This view has prompted the Supreme Court to require a plaintiff to show defendant's discriminatory intent to prevail in an equal protection challenge. *See, e.g.*, Personnel Adm'r v. Feeney, 442 U.S. 256, 278-80 (1979) (holding that incidental effect on a protected

scious character of private employment decisions. First, every individual employment decision is made with an awareness or perception of the candidate's race and other group characteristics—a perception that is always burdened with entrenched notions about racial and group differences. Second, even with generally applicable, facially neutral employment criteria, employers can reasonably be expected to consider the racial or gender implications of the criteria. Indeed, this expectation informs the Supreme Court's recognition of a disparate impact theory in *Griggs*. Third, the requirements for private employment are "thick," or more detailed, as opposed to the thin requirements of public citizenship: the employer attempts to distinguish among candidates based on sometimes subtle characteristics relevant to the job. Hence, differences among individuals are not relegated to a remote private sphere, but necessarily become a part of the equation. The decision maker's assumptions, whether conscious or not, about the connection between those job-related characteristics and race or gender inevitably come into play.[127] This personal, individualized decision-making process belies the presumption of equality (or "sameness") and places difference squarely in the foreground.

Given that employment decisions are impossible to evaluate using a group-blindness standard, is it reasonable to impose a requirement of employer neutrality with respect to race and group identity? We argue that the answer is *no.* Such a standard is meaningless (or almost impossible to prove) in a necessarily group-conscious decision-making process. This is true whether the burden is placed on the plaintiff to prove the precise role of race or group identity against a presumption of group-blindness, or on the employer to prove the absence of race as a factor in the decision. The difficulties that plaintiffs in pretext-plus courts have had in proving discriminatory intent illustrate the former;[128] *Taxman* illustrates the latter.[129] When the *Taxman* school board eliminated one job, it had to choose between two equally qualified teachers—one white and one black.[130] The school board could not deny the knowledge of the candidates' race; the decision was made with awareness of this difference. The school board had two options under the Third Circuit's view: either admitting that it had a

group is insufficient to demonstrate discriminatory purpose); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-68 (1977) (holding that proof of racially discriminatory intent is necessary to establish a violation of the Equal Protection Clause); Washington v. Davis, 426 U.S. 229, 248-52 (1976) (rejecting a disparate impact theory in an equal protection claim).

127 For an explanation and examples of how stereotyping affects employees' workplace standing, see Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

128 *See supra* Part II.B.

129 *See* Taxman v. Board of Educ., 91 F.3d 1547 (3d Cir. 1996).

130 *See id.* at 1551-52.

record of racial discrimination and therefore its affirmative action plan was remedial, or tossing a coin.[131] The first option is obviously problematic for the school board. The second option is equally problematic in view of the purposes of antidiscrimination law. If employers who are confronted with the reality of a racially diverse labor force and a societal history of discrimination are compelled to act as if race never matters, they can only aspire to apparent, but false, neutrality. The goal of equality will remain out of reach.

B. Neutrality, Freedom, and Private Employment

Liberal theorists have commonly linked arguments for state neutrality, including color-blindness, to the preservation of individual freedom and autonomy. As discussed in Part I, this view requires neutrality on the part of the state to ensure the full scope of individual self-determination within the private sphere.[132] As with the subordination of difference already discussed, translating this principle to the sphere of the private employer is also problematic for at least two reasons. First, theorists have thoroughly contested the degree to which state neutrality is possible.[133] Yet, as problematic as the concept of state neutrality may be, demarcating the limits of power is even more difficult in the context of the private employer. The workplace itself is an environment for which the employer is fully responsible. Though regulated in a myriad of ways to protect workers, the workplace is governed by the employer's economic purposes and interests. Indeed, the doctrinal evolution of workplace regulation has recognized the scope of employer control over the workplace. Title VII doctrine makes an employer responsible for the discriminatory conduct of its employees in situations in which the employer knew or should have known about the conduct.[134]

Second, imposing a standard of employer neutrality toward group identity does not serve the goal of expanding individual liberty in the workplace, even in the narrowest sense of expanding employment opportunity. Employment opportunities are always shaped by

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[131] *See id.* at 1567 (Sloviter, C.J., dissenting) (restating the question presented as "whether Title VII *requires* a . . . school board . . . to make its decision through a coin toss . . . or whether Title VII *permits* the school board to factor into the decision its bona fide belief . . . that students derive educational benefit by having a Black faculty member in an otherwise all-White department").

[132] *See supra* notes 21, 23-25.

[133] *See, e.g.*, Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992); Symposium, *Mediating Institutions: Beyond the Public/Private Distinction*, 61 U. CHI. L. REV. 1213 (1994); Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

[134] *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 801-08 (1998) (holding an employer vicariously liable for the harassing actions of a supervisor based on the employer's control of the conditions of the workplace and the allocation of power among employees).

group-based factors fully outside the employer's control—factors which operate to the advantage of some workers and to the disadvantage of others. At most, we can expect the employer to respond to such factors in a constructively group-conscious way. Moreover, the private workplace has invoked the language of freedom more often to justify the preservation of management prerogatives than to recoguize liberties of individual workers.

Conclusion

The doctrinal evolution of Title VII jurisprudence in recent years has increasingly converged with that of the Equal Protection Clause, specifically in its embrace of a color-blindness standard. In the context of constitutional limits on state action, a liberal understanding of the relationship between the individual and the state has informed the Supreme Court's adoption of color-blindness as a standard for measuring the constitutional obligation of equal protection. This standard, controversial in the sphere of state action, is even more problematic in the context of private employment decisions necessarily made with knowledge of race and the group dynamics of the workplace. Unfortunately, the continued unreflective acceptance of color-blindness in the interpretation of Title VII is likely to undermine the power of the statute to accomplish the goals that motivated its enactment: meaningful equality within a racially diverse workplace.